89-161 No. 89 161

Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BRENDA K. VENTURINO, JAMES L. VENTURINO, RAYCHELL ESTEP COLEMAN and PHILLIP BRIAN COLEMAN, Individually and as Administratrix of the Estate of PHILLIP DANIEL COLEMAN, Deceased,

Respondents

v

RICH'S BETTER GREASE SERVICE, INC., a corporation,

Petitioner

FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Fed. R. Civ. P. 26(b)(4)(B) bars a party litigant from deposing or calling as its own witness at trial, an expert hired by the insurance carrier of a party to the litigation, when the party desiring to use such expert has been advised that the opposing party does not intend to use such witness at trial.

PARTIES TO THE ACTION

A list of all parties to the proceeding in the court below is found on page 1a of the Appendix.

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FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Rich's Better Grease Service, Inc., respectfully prays that a writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals of the Fourth Circuit, entered in this proceeding on April 12, 1989.

OPINION BELOW

The Order of the United States Court of Appeals for

.he Fourth Circuit was entered on April 12, 1989, and appears in the Appendix.

JURISDICTION

The Order of the Court of Appeals was entered on April 12, 1989. A Petition for Rehearing In Banc was denied on May 10, 1989. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1)

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 26(b)(4)(B)

> "A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

STATEMENT OF THE CASE

This personal injury and wrongful death case arises from a collision between a truck owned by Petitioner, Rich's Better Grease Service, Inc., and a car driven by Brenda Venturino. Respondent, Raychell Coleman, Venturino's daughter, was a passenger in the car at the time of the accident. The two vehicles were travelling in opposite directions on a two-lane highway and were about to meet and pass when the collision occurred. Each driver insists the other crossed the center line and caused the wreck. Both Venturino and Coleman suffered extensive injuries, including permanent brain injury to Raychell Coleman. In addition, Coleman's eight month viable fetus could not be saved.

At the time of the accident, Venturino was insured against automobile-related liability by State Farm Insurance Company. State Farm investigated the accident and subsequently paid to Coleman and Coleman's husband, Brian, the amount of Venturino's policy limit in settlement of any potential claims, including the death of the fetus, against Brenda Venturino. State Farm additionally made payments to Venturino for the property damage to her automobile.

During State Farm's early investigation of the accident and prior to settling with the Colemans, State Farm hired Gregg Manning, an accident reconstruction expert. At the time of the investigation no suit had been filed against Venturino, although the Colemans had retained an attorney. No action has ever been filed against Venturino.

In August, 1986, the Venturinos and Colemans brought suit in the district court against defendant based on alleged negligence of the defendant's truck driver. In September, 1986, plaintiffs filed an amended complaint to include a claim for the damage to Venturino's car. No mention was made that such claim was a subrogation claim of State Farm.

Not wanting to rely on the reconstruction expert hired by State Farm, upon whose opinion State Farm paid its limits on behalf of their insured, Respondents' attorneys secured the services of another reconstruction expert who at trial somewhat weakly opined that Petitioner's truck drove left of center.

State Farm was not made a party plaintiff until just prior to the start of trial after the District Court had ruled that Petitioner could not depose or use as its own witness Gregg Manning, State Farm's reconstruction expert. The purpose of adding State Farm on Petitioner's motion was to present evidence of the details

concerning State Farm's settlement with Raychell Coleman on behalf of their insured, Brenda Venturino. Since State Farm had then been made a party plaintiff, Petitioner intended to show this as an admission against interest.

Prior to the trial, Petitioner noticed the deposition of State Farm's expert Gregg Manning. Petitioner contended that Manning's expert opinion supports Petitioner's theory that the car driven by Brenda Venturino swerved into the path of Petitioner's truck. Respondents' counsel moved to quash the taking of the deposition. Citing Fed. R. Civ. P. 26(b)(4)(B), the district court entered an order prohibiting Petitioner from deposing Manning.

Petitioner then asserted that Manning would be called as one of its witnesses at trial. This, too, the district court, without any authority or reason barred, stating, in a later memorandum opinion, that Petitioner's "(c)ounsel could produce no competent authority in support of its action and this court ruled that defendant could not call Manning to testify." The district court could produce no authority competent or otherwise to prohibit a litigant from calling any witness it desired in its defense.

At the end of the trial, bifurcated as to the action's liability and damages components, the jury returned a verdict in favor of Raychell Coleman, Brian Coleman, and Brian Coleman as administrator of the estate of the fetus for a total of $2,290,722.92, $1,000,000.00 for the fetus. Petitioner, thereafter moved the district court to set aside the jury verdict, and assigned in support of said motion several errors. The district court denied this motion.

The decision of the district court was affirmed by the United States District Court of Appeals for the

Fourth Circuit, on April 12, 1989, with the court addressing only the question of whether the district court erred in refusing to permit petitioner to depose Gregg Manning or call him as its own witness. That Court contended erroneously that the four other grounds of error by the district court, cited by Petitioner, were without merit.

Petitioner's Petition for a Rehearing In Banc was denied on May 10, 1989.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW REPRESENTS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO SERIOUS THAT THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS REQUIRED, AND THE FEDERAL COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

To obtain a review of a decision below a petitioner must show that the decision not only is wrong but also that it carries with it serious and dangerous repercussions and that it involves an important question of federal law which has not been but should be settled by this court.

In this day of the proliferation of civil actions in which expert witnesses are deeply involved, such as product liability, malpractice, automobile reconstruction and many others and with the availability of thousands of expert witnesses who make themselves available to render opinions on any subject, it is vital for this court to determine under what circumstances one party to a law suit may call as its witness an expert hired by a third party when the opposing party to a law suit has advised that it does not intend to call such expert as its witness.

State Farm hired Gregg Manning as its reconstruction expert shortly after the accident and based

on his opinion of fault on the part of its insured, State Farm settled with the Colemans. Thereafter the Colemans brought suit against Petitioner, and their attorney, not liking Gregg Manning's opinion, hired another expert who laid the blame on Petitioner's driver. Petitioner intended to rely on Gregg Manning's opinion in its defense. Respondents successfully thwarted such intent and aided by the district court prevented the whole truth from being presented to the jury.

Petitioner became aware, when the pre-trial order was filed, that Respondents did not intend to use Gregg Manning as a witness, but intended to use another expert they, not State Farm, had shopped around to secure and give an opposing opinion.

Petitioner notified Respondent that it intended to depose Gregg Manning and Respondent objected to the deposition relying upon the above-quoted rule and the case of *Barnes v. City of Parkersburg,* 100 F.R.D. 768, 769 (S.D.W.Va. 1984).

Gregg Manning was not employed by "another party", as required by the rule, nor was he employed in anticipation of this litigation, or for preparation for trial. He was retained by State Farm, not a party to this litigation, until trial commenced, and was retained not in anticipation of this litigation or preparation for this trial, but to determine liability insofar as the Coleman claims against Venturino were concerned. No suit was brought by the Colemans against the Venturinos and State Farm was in no way concerned with the suit of the Colemans and the Venturinos against Petitioner, save for the belated ploy of amending the original complaint to add an insignificant property damage claim for the sole purpose of preventing Petitioner from using Gregg Manning as its witness.

The district court got around the requirement of the rule that the expert must have been hired by a party to the litigation by holding that State Farm was "technically" a party by virtue of a subrogation claim having been included in the amended complaint belatedly although the property damage claim was not designated as a subrogation claim. Any award of property damage would be in the name of the insured who would have to account to State Farm under the terms of its subrogation agreement, a separate cause of action.

If it could be considered that State Farm was "technically" a party and that Manning, therefore, came within the Rule by some stretch of the imagination, the case of *State Farm Fire & Cas. Co. v. Perrigan*, 102 F.R.D. 235 is authority nevertheless for permitting Appellant to depose Mr. Manning. In that case the Court held that where the possibility of litigating the claim is not substantial or imminent at the time of the investigation, the opinions of the expert are discoverable, stating further, "since the report was prepared during the ordinary course of the insurance company's business and not in anticipation of trial" the report is discoverable.

Confronted with the astounding ruling that Petitioner could not depose Manning, Petitioner then indicated it would call Gregg Manning as its own witness at trial and be bound by his testimony without the benefit of his deposition. Respondents objected to this request and moved that Petitioner be prohibited from doing so.

The district court, relying upon no authority other than the rule pertaining to discovery procedure and not trial procedure, sustained Respondents' motion.

The district court, in its memorandum opinion over-

ruling Petitioner's motion to set aside the verdict, stated that "counsel could produce no competent authority in support of its action (to call Manning as its witness)... This Court is unpersuaded by defendant's continuing argument that these rulings were in error." No competent authority was presented that Petitioner could *not* call any willing witness it desired, and such an obvious right of a party litigant would not be much discussed in the case law.

It has been held that Rule 26(b)(4) is inapplicable where a party is seeking to use an expert formerly employed as a consultant by his adversary at the trial. *Nevels v. Ford Motor Company*, 439 F.2d 251 (5th Cir. 1971). In *Nevels*, the Court quoted a state court decision as follows:

> '. . . *The ultimate end of all litigation is the ascertainment and rendition of the truth.* The truth can be determined only through the sworn testimony of witnesses. Thus, any person not privileged having knowledge of issues being tried should be made available to the parties as witnesses. . . . " (Emphasis ours)

The Court of Appeals, while pointing out that the district court did not state with specificity its basis for prohibiting petitioner from calling Manning, *guessed* that the district court believed the prohibition to be an extension of Rule 26(b)(4)(B) "which 'is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation.' "

In the first place, if the Court of Appeals has to guess what the district court had in mind, that constitutes error per se, and in the second place, when the Court of Appeals states, as it did, that it did not construe Rule 26(b)(4)(B) to contain a broad proscription against calling witnesses who could not have been deposed

under the rule, and then finding, in a "sense of fairness" that the rule did in fact contain such a proscription, such action defies comprehension.

The Court of Appeals admitted that the question presented here has not received consideration in the case law. For that reason, to permit a party litigant to shop around until he can find a favorable expert and then prevent the opposing party from calling as its own witness other experts known to the original litigant but discarded because of unfavorable opinions, would curtail justice rather than promote "fairness" as both lower courts indicated they were doing.

The Court of Appeals stated they were persuaded that the district judge did not abuse his discretion in ruling that Petitioners could not call Manning to testify and cited *Campbell Industries v. MIU Gemini*, 619 F.2d 24 (9th Cir. 1980). In that case the court stated:

> "We cannot say that the district court's ruling, which was carefully fashioned to deny Gemini the fruits of its misconduct yet not interfere with Gemini's right to produce other relevant expert testimony constituted an abuse of discretion."

The Court also cited *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984).

In that case, the Court found that defendants had violated Rule 26 F.R.C.P. and additionally that they had the benefit of other expert testimony upon which to rely, circumstances not present in this case.

The Court held:

> "The rule is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation. . .
>
> "In proceeding as they did, defendants circumvented the discovery process and subverted the principle of fairness that underlies Rule

> 26(b)(4)(B). Defendants' disregard of the Rule, coupled with the prejudice Dr. Dyck's specially informed opinion might work on plaintiffs' case, justified the trial court's exclusion of the proffered evidence. The exclusion worked no hardship on defendants because they presented another expert on the same subject. So, our holding is that the trial judge acted within his discretion. In different circumstances we recognize that a trial judge might not be required to exclude the testimony of a witness consulted in violation of the rules of discovery."

The lower court's ruling in this case certainly did not permit fairness to Petitioner. Gregg Manning's opinion was not secured as a result of Respondents' "diligent trial preparation". That opinion was determined in investigating the claims of the Colemans against the Venturinos and by people not parties to this suit.

Petitioner, in this case, was guilty of no misconduct and did not have any other expert witness to produce so late in the game as was the situation in *Gemini* and *Durflinger*.

If anyone was guilty of misconduct in this case it was the action of Respondents in shopping around for a prostitute witness to substantiate their position and precluding the jury from hearing the independent expert hired by State Farm. Both lower courts maintain that in a sense of fairness Petitioner couldn't call Gregg Manning as its witness and then proceed to treat Petitioner unfairly by prohibiting it from doing what it had every right to do under the law, and that is present all the evidence to the jury. Petitioner should not, under our System of Justice and Fairness, be precluded from presenting all the facts to a jury, nor should Respondents be rewarded by subverting the truth.

In summary, this case requires review by this Court due to the importance of the question involved and the ramifications the decision below may have on all civil actions involving the use of expert witnesses.

CONCLUSION

The decision below represents a departure from the accepted and usual course of judicial proceedings so serious that the exercise of this Court's power of supervision is required. Every litigant has a right to call any witness it desires in order to present its defense, unless there is some authority which prevents its doing so. No such authority is relied upon in this case which would have prevented Petitioner from calling Manning as its own witness. To allow the lower court's decision to stand will have disastrous effect upon all civil litigation involving expert witnesses.

This Court of Appeals admits that it has decided an important question of federal law, which has not been settled by this Court.

For these compelling reasons, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

In The United States District Court for
The Southern District of West Virginia
At Huntington

Brenda K. Venturino, James L. Venturino, Raychell Venturino Stepp Coleman and Phillip Brian Coleman, Individually, and as Administratrix of the Estate of Phillip Daniel Coleman, Deceased, and State Farm Insurance Company,

Plaintiffs,

v. *Civil Action No. 3:85-0749*

Rich's Better Grease Service, Inc.,

Defendant.

MEMORANDUM OPINION AND ORDER

This court has before it the defendant's motion to set aside the verdict and enter judgment in favor of the defendant following a jury verdict for the plaintiffs, with regard to a motor vehicle accident. This court has jurisdiction pursuant to diversity of citizenship and the amount in controversy. 28 U.S.C. § 1332(a)(1). For the reasons stated below, the motion to set aside the verdict is DENIED.

I.

The trial was bifurcated with the liability and damages issues submitted separately to the jury. The facts as to the liability issue were highly contested. Defendant presented no evidence as to the issue of damages.

The evidence indicated that on February 20, 1985, a collision involving the plaintiff's automobile and the defendant's truck occurred on State Route 119 in

Mingo County, West Virginia. The automobile was driven by Brenda Venturino. Her daughter, Raychell Coleman, age 19 and 38 weeks pregnant, was a passenger. The truck was operated by William South, an employee of Defendant Rich's Better Grease Service, Inc.

The principal issue as to liability was which vehicle crossed the center line immediately prior to the impact. The jury resolved that issue in favor of the plaintiffs and found the defendant 100% negligent. Following that determination, Plaintiff Brenda Venturino and her husband settled their claims with the defendant as to damages. The second stage of the bifurcated trial then began as to damages suffered by Raychell Coleman.

During the damage phase, the evidence indicated that, as a result of the accident, Raychell suffered permanent brain damage, abdominal and other injuries and lost her unborn child. At the conclusion of the evidence, the court instructed the jury and presented it with special verdict interrogatories addressing each of the plaintiffs' claims. The jury returned a verdict in favor of Raychell Coleman in the amount of $1,244,727.92 ($74,727.92, the amount of medical bills incurred to date; $70,000 for future medical bills; $500,000 for lost wages and loss of future earning capacity; $100,000 for pain and suffering; and $500,000 for loss of enjoyment of life, including the inability to engage in normal pursuits and activities, and permanent disability and disfigurement). A verdict in favor of Phillip Brian Coleman, Raychell's husband, in the amount of $100,000, was returned on his loss of consortium claim. With regard to the wrongful death claim against the defendant for loss of their unborn child, the jury returned a verdict in favor of Raychell and Phillip Brian in the amount of $1,000,000.

II.

In its motion to set aside the verdict, the defendant asserts that (1) the verdicts were contrary to the law and the evidence; (2) the verdict on the liability aspect of the civil action was contrary to the physical facts established by the evidence; (3) the court erred in failing to direct a verdict on the liability at the conclusion of plaintiff's evidence and again at the conclusion of all the evidence; (4) the court erred in refusing to permit the defendant to inquire of Brewster, the State Farm Insurance Company adjuster, as to his determination that Brenda Venturino was negligent in the accident and that State Farm had settled the Coleman's claim against their insured by paying the full policy limits and thus admitted liability; (6) the court erred in refusing to give defendant's instructions numbered 1 and 4; (7) the court erred in refusing to permit the defendant to argue that lack of seat belts as contributing to more severe injuries in the damage aspect of the trial; and (8) the amount of the verdict in the damage aspect of the trial was excessive, particularly the one million dollars award for the wrongful death claim, which amount indicates that the jury was influenced by passion, prejudice and a mistaken view of the case and was in an amount which shocked the conscience.

III.

RELEVANT STANDARD

Before turning to the merits of this case, we must address the correct standard to employ in viewing the verdict based upon defendant's motion. We read the defendant's motion to set aside the verdict and enter judgment in favor of the defendant as a motion made pursuant to Federal Rule of Civil Procedure 50(b); i.e., as a motion for judgment notwithstanding the verdict

(judgment n.o.v.).[1] The standard for determining the appropriateness of a directed verdict.[2] The trial court must consider the evidence in the light most favorable to the plaintiffs, resolving conflicts in the evidence in their favor and drawing all possible conclusions and inferences in their behalf. *Wyatt v. Interstate & Ocean Transport Company*, 623 F.2d 888, 891 (4th Cir. 1980). In doing so, the court may not weigh the evidence, determine the credibility of witnesses or substitute its judgment for that of the jury. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 155 (4th Cir. 1976), cert. denied, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976). Rather, the court should only determine whether there was sufficient evidence for the matter to have gone to the jury in the first instance. *Handley v. Union Carbide Corp.*, 620 F.Supp. 428, 431 (S.D.W.Va. 1985), stay denied, 622 F.Supp. 1065, affirmed 804 F.2d 265. "Substantial evidence" is "evidence of such quality and weight that reasonable and fair-minded [people] in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party ..." *Wyatt v. Interstate & Ocean Transport Company*, 623 F.2d. at 891.

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[1]Rule 50(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict ...

[2]A different standard is required for a motion for a new trial on the merits. Under Rule 59 of the Federal Rules of Civil Procedure, a motion for a new trial requires a "comparison of opposing proofs." *William v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959). The district court may set aside a verdict supported by substantial evidence if "it is contrary to the clear weight of the evidence, or is based upon evidence which is false," or is "necessary to prevent a miscarriage of justice." *Aetna Casualty v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941). As defendant did not join his motion to set aside the verdict with a motion for a new trial, we will consider the liability issue based upon the Rule 50(b) standard.

IV.

In the first three grounds asserted, defendant takes issue with the court's decision to submit the case to the jury on the issue of liability and the jury's finding that defendant was 100% negligent.

The facts presented at trial revealed that defendant's truck was traveling in a southerly direction toward Williamson and the plaintiff's Chevrolet car was traveling in a northerly direction toward Holden at approximately 11:10 A.M. on February 20, 1985, when they collided on State Route 119 in Mingo County, West Virginia. The highway was a narrow, two lane, winding, blacktop road; each lane was estimated to be ten feet wide. The width of the defendant's 1981 single axle International truck was estimated by defendant's driver to be seven feet eleven-and-one-half inches wide. Snow was present along both sides of the road and water was running across the road. The State Police arrived at the scene of the accident approximately thrity minutes after it had happened. An ambulance was at the scene and the attendants were administering aid to the plaintiffs when the troopers arrived. The officers interviewed William South, the driver of defendant's truck. They made a diagram of the scene but took no measurements. One of the officers testified that plaintiffs' car, after impact, was wholly in the lane in which it had been traveling; that there was debris from the crash in the center of the road; and that plaintiff's car was damaged from the center of the front end to the driver's side of the front end. He stated that he was unable to determine where the collision occurred or who was at fault based upon his investigation.

William South, defendant's driver, testified that he was traveling at approximately 25 mph in his lane when he saw plaintiffs' car 100 feet ahead drive off the

road, hit a snow bank and swerve sharply across the center line into his path. He stated that he immediately applied his brakes and cut his wheels to the right. He asserted that his left front wheel was a good two feet off the road onto the berm of his lane at the time of impact. He alleges that the vehicles were not moved following the collision until the officers ordered the same and, in any event, his truck could not be moved because the truck's bumper was pushed against the truck's left front tire, immobilizing it. He further stated that he showed the troopers tire tracks in a snow bank which he claims were made by the plaintiffs' car just prior to the accident.

Plaintiffs gave a somewhat different version of the facts surrounding the accident. Mrs. Venturino testified that she was traveling at approximately 20-25 mph in her lane when the defendant's truck, which she estimated was traveling at 45 mph, suddenly swung wide in a curve, crossed the center line and collided with her car. Mrs. Venturino's testimony was essentially corroborated by the testimony of plaintiffs' expert, Dr. Christoper Shafley, a consulting engineer specializing in accident reconstruction, and by the testimony of Gary Rash, an alleged eyewitness whose presence became known to the parties approximately one year after the accident. Each of these witnesses was subject to cross examination.

The remaining witnesses who were called to testify essentially testified as to facts regarding the credibility of Rash's testimony. Defendant did not call an expert witness to testify with regard to accident reconstruction.

It is manifest from the record in this case that plaintiff presented substantial evidence in opposition to the defendant's motion for a directed verdict. It is also manifest from the record that there was con-

flicting evidence for the jury to consider on the issue of liability. The evidence was susceptible to a number of inferences as to where and how the collision occurred and whether plaintiff (i.e., Mrs. Venturino) or defendant's driver or both of them were at fault. The jury heard that evidence, had the opportunity to weigh the evidence and judge the credibility of the witnesses, and did so, reaching a verdict against the defendant. Under these circumstances, this court does not see fit to disturb this verdict on defendant's motion.

V.

EVIDENTIARY MATTERS

Grounds 4, 5 and 7 concern this court's rulings with regard to discovery and admissibility of certain evidence.

Less than three weeks prior to trial in this action, defendant noticed the deposition of Greg Manning, a consultant hired by State Farm Insurance Company, the Venturino Plaintiffs' insurer, to investigate the accident. At the time the motion was filed, defendant had not listed any expert witness on its witness list in the pre-trial order which had been submitted to the court for filing. After hearing argument on plaintiffs' motion to quash the taking of the deposition and after reviewing the affidavit of Jack Brewster, we determined that Manning was an expert retained by the plaintiffs in anticipation of litigation, but whom plaintiffs did not intend to call as a witness at the trial in this action.[3] Accordingly, we applied Federal Rule of Civil Procedure 26(b)(4)(B). Because defendant failed to make any showing of exceptional circumstances under which it was impracticable for it to

[3]State Farm was the subragee of the Venturinos' property loss claim. It was made a party plaintiff for the limited purpose of pursuing the Venturinos' property loss claim.

obtain its own accident reconstruction expert or obtain the facts or opinions it sought by other means, we entered an order prohibiting the defendant from taking Manning's deposition. *See, Barnes v. City of Parkersburg*, 100 F.R.D. 768, 769 (S.D.W.Va. 1984) (and cases cited therein). Thereafter, defendant announced that it intended to call Manning as a witness at trial despite its inability to depose him. Counsel could produce no competent authority in support of its action and this court ruled that defendant could not call Manning to testify. This court is unpersuaded by defendant's continuing argument that these rulings were in error.

Defendant also objected to this court's ruling prior to trial, and a continuing objection was made, that evidence of the settlement reached between the Colemans and the Venturinos and their insurer was not an admission of liability by Brenda Venturino or her insurer and should be excluded from the evidence. It was defendant's intention to inform the jury, through the testimony of Jack Brewster, that Raychell had filed a claim against her mother for personal injuries and the loss of her unborn child as a result of the accident, that the Venturinos' insurer settled for the full limits of their policy, and that this settlement constituted an admission of liability on the part of either Brenda Venturino or her insurer.

Federal Rules of Evidence 408 provides that

> [e]vidence of ... (2) accepting ... a valuable consideration in compromising ... a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible ...

The release signed by the Colemans in settlement of

their claims against the Venturinos expressly states that

> payment of said sum is not an admission of liability, and indeed, liability is specifically denied, on the part of Brenda Venturino, J. Larry Venturino or State Farm Mutual Automobile Insurance Company, or employees, but is made in compromise and settlement of a disputed claim.

We find no error in the exclusion of evidence regarding the settlement reached between the Venturinos' insurer and the Colemans.[4]

Defendant further alleges error in this court's refusal to allow defendant's counsel to argue to the jury that Raychell's alleged non-use of her seat belt should be considered by the jury in mitigation of damages. We find no merit to this allegation.

In the first place, in anticipation of such an issue, the court directed the parties to brief the seat belt issue prior to trial.[5] At a hearing held on September 28, 1987, one week prior to trial, the court took up the issue and the following colloquy was had:

> Mr. Ketchum [plaintiffs' counsel]: I made a motion in limine on the seat belt defense.
>
> Mr. Mohler [defendant's counsel]: I'm not arguing that.
>
> The Court: He's not using seat belt defense. That's out; or, rather, he's not asserting because seat belts were being worn that there was any negligence.
>
> Mr. Mohler: That they weren't worn. I'm not claiming that's negligence.

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[4]The judgment sum awarded the plaintiffs was reduced by the amount received in the settlement.

[5]West Virginia law is silent as to whether the alleged non-use of a seat belt should be considered by a jury in mitigation of damages.

The Court: That takes care of that.

No further discussion was had on the seat belt issue until the last day of the trial then defendant's counsel indicated that it intended to raise the issue by argument. The only witness remaining to testify was plaintiffs' economic expert. Defendant had called no witnesses with regard to damages and indicated that it had no witnesses to call. Regardless of whether defendant had abandoned the seat belt issue prior to trial, it was not entitled to submit the issue to the jury with regard to mitigation of damages because defendant did not demonstrate, by competent and satisfactory evidence (i.e., through expert testimony), the extent that Raychell's injuries could have been avoided by wearing a seat belt. *See, Wilson v. Volkswagen of America,* 445 F.Supp. 1368, 1372-73 (E.D.Va. 1978). We so hold.

VI.

The sixth contention, which alleges this court erred in refusing to give two of defendant's proposed instructions, has not been urged by the defendant in its memorandum of law filed in support of this motion. Thus, that point is deemed abandoned. See, Local Rule 2.03.

VII.

Finally, the defendant argues that the verdict was so excessive as to require a remittitur. It asserts that the jury was influenced by "passion, prejudice and a mistaken view of the case and [the verdict] was in an amount which shocked the conscience."

We acknowledge that the jury's award is large, but we do not agree that it is so large that it be deemed excessive as a matter of law. Generally, the assessment of damages lies within the sound discretion of the jury. *Compton v. Wyle Laboratories,* 674 F.2d

206 (4th Cir. 1982). This is especially so where, as here, damages do not admit of definite estimate and there is no legal measure. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470 (8th Cir. 1987). The ultimate test for setting aside a verdict is whether "[the] verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice. *Virginia Ry. v. Armentrout,* 166 F.2d 400, 407 (4th Cir. 1985); *see Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1423 (4th Cir. 1985). In federal court, a jury's award will not be reduced as excessive unless it is beyond the maximum that the jury could reasonably find to be compensatory for the parties' loss. *Jones v. Wittenberg University,* 534 F.2d 1023 (6th Cir. 1976). Moreover, remittitur may not be employed to cure an excessive verdict that resulted from passion, prejudice or caprice; the appropriate remedy for a verdict found to be excessive on this ground is a new trial. *See Arnold v. Eastern Airlines,* 681 F.2d 186, 206 (4th Cir. 1982), *cert. denied sub. nom, Aetna Casualty & Surety Co. v. United States,* 460 U.S. 1102 (1981). *See generally,* 6A Moore's Federal Practice ¶59.05(3).

The case was submitted to the jury on three separate claims: (1) damages suffered by Raychell, (2) damages suffered by Phillip Brian for the loss of his wife's consortium and (3) damages suffered by Raychell and Phillip Brian for the wrongful death of their child.

A. Raychell

The medical evidence established that Raychell suffered extensive injuries as a result of the collision; in particular, a severe closed head injury, a blunt trauma to the abdomen, splenic and pancreatic contusions, and the loss of her unborn child. Raychell was in a coma for a prolonged period following the collision, during which time her diagnosis included "intra-

cranial hemmorrhage," "subarachnoid hemmorrhage" and "brain stem contusion." Following a period of recovery, she developed hydrocephalus and was required to undergo brain surgery. During the course of that operation, a ventriculoperitoneal shunt was implanted in her brain to drain excess fluid from her brain to her abdomen. With regard to her abdominal injuries, Raychell underwent an emergency caesarean section and laparotomy. Raychell has also undergone eye surgery as well as extensive physical, speech, rehabilitation and psychiatric therapy. The parties agreed that the medical expenses to date totaled $74,727.92 and stipulated to the reasonableness and necessity thereof.

The medical evidence also established that Raychell suffered a permanent impairment as a result of the injuries she sustained in the collision. It is estimated that she has lost 25% of her intellectual and emotional capacity; that she suffers from moderate to marked impairment of memory, marked depression, motor impairment on the right side (she is right hand dominant), visual problems (i.e., double and blurred vision and crossed eyes), spasticity, loss of balance, reduced gag reflex, surgical scars and pain. Dr. Virginia Garrett, an expert in physical and rehabilitation medicine, testified, to a reasonable degree of medical certainty, that Raychell will incur future medical expenses as a result of her impairment. Ths includes brain surgery every five to ten years for shunt replacement as well as followup treatment for her shunt for an indefinite period and rehabilitation therapy for an additional two years. Dr. Garrett further testified that Raychell's injured brain, abdominal scars and emotional instability will pesent special problems in the event of illness or re-injury or pregnancy, increasing the costs of future medical expenses.

We note from the testimony of Dr. Phillip A. Tibbs, the neurosurgeon who performed the shunt implant, that the cost for that operation was $8,422.90. Given Raychell's age (22) and her life expectancy, which Dr. Garrett stated was 65 to 70 years barring illness or re-injury, the jury could have determined that Raychell can expect to undergo 4-9 brain operations. Without consideration of inflation or the likelihood of complications developing — which risk Dr. Garrett estimated to be between 60 to 90 percent — the range of cost for shunt replacement alone is $33,691.60 to $75,806.10.

Dr. Garrett estimated rehabilitation therapy to cost $5,000 to $10,000 over the next two years. If Raychell should become pregnant, she estimated that the obstetrician alone would cost $10,000. Complications arising from illness (i.e., the flu) or surgery were estimated to cost an additional $10,000. Psychiatric hospitalization and treatment was said to cost at least $2,000.

The jury returned a verdict of $70,000 for future medical expenses. While defendant contends this award is "excessive," we find, in weighing all the evidence and the noncontroversial nature of the defense as to damages, that the jury could properly have returned the verdict that it did.

Accordingly, this court denies defendant's motion to grant a remittitur of any part of the $70,000 award for future medical expenses.

Defendant also claims that the award of $500,000 for lost wages to date and loss of future earning power is excessive because the amount projected by plaintiffs' witness, based upon the salary Raychell was making at the time of the accident was approximately $420,000. Defendant's argument is fallacious for two

reasons: (1) It is only "half the story." Dr. William E. Cobb, the economic expert, also testified that the present value of Raychell's past and future economic loss based upon wages earned by the average rural West Virginia high school graduate, assuming retirement at age 65, is $846,963. (2) The jury is not bound to accept the computations made by plaintiff's expert; ultimately, such computations are wi[illegible]and uniquely within the jury's province. While expert testimony is often helpful to the jury, such testimony is itself at best speculative. As the court said in *Wiles v. New York, Chicago and St. Louis R. Co.*, 283 F.2d 328 (3rd Cir. 1960):

> Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation.

Id. at 332.

In the present case, it was undisputed that Raychell was terribly injured; however, because of her tender age (19) and short work history (5 months in 1984), there was little from which loss of earning capacity could be estimated with any degree of certainty. As such, the jury had to do the best it could to estimate, taking into account such matters as past earnings and average earnings. It could also consider, and the record supports such, that Raychell was average to average bright, has some college training, and was a highly motivated individual. *See, Virginia Railway v. Armentrout,* 166 F.2d 400, 407 (4th Cir. 1948). *Accord, Jordan v. Bero,* 210 S.E.2d 618, 636-637 (W.Va. 1974). The award of $500,000 for lost wages and loss of future earning capacity, in light of these considerations and in light of the range estimated by plaintiff's economic expert, is reasonable.

Accordingly, this court denies defendant's motion

to grant a remittitur for any part of the $500,000 award for lost wages and loss of future earning capacity.

The awards of $100,000 for pain and suffering and $500,000 for loss of enjoyment of life, including the inability to engage in normal pursuits and activities, and permanent disability and disfigurement, are not seriously contested by defendant. *See* defendant's memorandum of law filed in support of its motion, p. . . . However, defendant does contend that these damages are duplicated in the wrongful death award. We find no merit in this contention; there was more than ample evidence to support separate damages for these separate claims.

B. Phillip Brian

Nor is the award of $100,000 to Phillip Brian for loss of his wife's consortium contested by defendant save for defendant's unfounded contention that it is duplicated in the wrongful death award.

C. Wrongful Death

The West Virginia Wrongful Death Statute, W.Va. Code § 55-7-6 [1982] (the statute in effect at the time of Phillip Daniel's death) specifically sets forth in subsections (c)(1) and (2) the losses for which damages can be recovered.[6] The jury was instructed as follows:

---

[6]Code, 55-7-6 [1982] provides:

(c)(1) The verdict of the jury shall include, but may not be limited to, damages for the following (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expense.

(2) In its verdict the jury shall set forth separately the amount of damages, if any, awarded by it for reasonable funeral, hospital, medical and said other expenses incurred as a result of the wrongful act, neglect or default of the defendant or defendants which resulted in death, and any such amount recovered for such expenses shall be so expended by the personal representative.

> You may award Ray[illegible]ll Coleman and Phillip Brian Coleman as dam[illegible]s, if any, an amount of money which you deem to be fair and adequate to reasonably compensate them for the death of their child. You may consider:
>
> (1) Such amount as will fairly and reasonably compensate Raychell and Phillip Coleman for their sorrow and mental anguish and for the loss of their child's society, companionship, comfort, guidance and advice; and
>
> (2) The agreed amount of funeral and burial expenses totaling $1,440.00.

In its memorandum of law, defendant asserts that the record supports no award to the Colemans for the wrongful death of their child save the stipulated amount for funeral expenses. We believe the evidence supports a finding of damages on the element of sorrow, mental anguish and solace.

Raychell was pregnant with the male child which, the evidence shows, she and her husband had eagerly anticipated. It was stipulated by the parties that he was a viable 38 week old fetus at the time of the collision. He died in his mother's womb the day following the accident from injuries sustained in the collision. An emergency caesarean section had to be performed to remove the dead child from its mother. The child was named. A funeral was held. At the trial, Raychell was visibly distraught; her emotional instability did not permit her to testify. Her husband and the treating physicians testified as to the emotional impact of the loss of the child on the couple. The medical testimony revealed that the impact has been greatest on Raychell. Dr. Clubb, Raychell's treating physician at the Charleston Area Medical Center, stated that he had to refer Raychell to consultants in Behavioral Medicine to deal with her emotional problems — emotional problems he attributed chiefly to

her concern over the loss of her child. Dr. Garrett, a psychiatrist, stated that the medical records indicate that Raychell's chief ongoing complaint concerns her grief over the loss of her baby. Upon cross examination, Dr. Garrett stated that while Raychell's reaction is "very normal," "she has dealt with [the loss] deeper and longer than the average mother would [have dealt with] the loss of a baby" because Raychell does not presently have the brain tissue to help her cope with it and the memory to remember that she has grieved. Dr. Garrett further indicated that Raychell's grief is not minimized by the possibility of having another child at some later date.

The jury obviously found from this evidence that the Coleman's damages, apart from the funeral bill, were substantial.

Like pain and suffering, sorrow, mental anguish and solace are difficult to value and quantify in monetary terms. In *Jordan v. Bero*, 210 S.E.2d 618, 636 (W.Va. 1974), the court said:

> In this case we recognize and apply the rule of *Collins v. Skaggs*, 110 W.Va. 518, 159 S.E. 515 (1931), which held:
>
> "The law furnishes no measure of damages for pain and suffering. In such case, the decision of the jury upon the amount is generally conclusive, unless it is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case."

Id. at page 520, 159 S.E. at page 516.

In *Robert: v. Stevens Clinic Hospital, Inc.*, 345 S.E.2d 791, 800 (W.Va. 1986), the court gave some guidance as to the maximum measure of damages for sorrow, mental anguish and solatium in the wrongful

death of an infant. In *Roberts*, after the court determined that the jury had been influenced by the prejudicial remarks of plaintiffs' counsel in his closing argument with regard to the measure of damages, it granted a remittitur of $7,000,000 of a $10,000,000 jury award for the wrongful death of a 2½ year old boy. Thus, an award of $3,000,000 was allowed to stand.

In the present case, while the award is large, there is nothing in the record to suggest that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case and "lost its head." *See, Gruenthal v. Long Island Railroad Company*, 393 U.S. 156, 89 S.Ct. 331 (1968). The issues of liability and damages were bifurcated so as to lessen the risk of prejudice and possible confusion. There was no objection made at trial regarding the impropriety of plaintiffs' counsel's conduct. The jury was carefully instructed as to damages and special interrogatories, separately listing damages, were employed. The damages for sorrow and mental anguish and solace do not admit of definite estimate and there is no legal measure therefor. Notwithstanding that each case must be considered on its own facts when determining whether a verdict is excessive, we do not believe that the verdict is beyond the maximum that the jury could reasonably find to be compensatory for the plaintiff's loss. *See Roberts*, 345 S.E.2d at 800.

This court, for the reasons stated above, hereby denies defendant's motion to grant a remittitur of any part of the award for the wrongful death of the Coleman child.

For the foregoing reasons, the defendant's motion to set aside the verdict and enter judgment for the de-

fendant, or in the alternative, to grant a remittitur, is hereby OVERRULED.

It is accordingly ORDERED that the judgment entered in this action shall stand as entered.

The clerk of the court is directed to mail a certified copy of this order to all counsel of record.

A TRUE COPY, Certified this March 29, 1988
Ronald D. Lawson, Clerk

ENTER:
Robert J. Staker
United States District Judge

United States Court of Appeals
For The Fourth Circuit

No. 88-2095

Brenda K. Venturino, James L. Venturino, Raychell Stepp Coleman and Philip Brian Coleman, Individually and as Administratrix of the Estate of Phillip Daniel Coleman, Deceased,

Plaintiffs - Appellees,

vs.

Rich's Better Grease Service, Inc., a corporation,

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert J. Staker, District Judge. (CA-3-86-0749)

Argued: December 7, 1988 Decided: April 12, 1989

Before WILKINS, Circuit Judge, MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

William Edward Mohler, II for Appellant. John Harlow Bicknell (Menis E. Ketchum, GREENE, KETCHUM, BAILEY & TWEEL, on brief) for Appellee.

PER CURIAM

This personal injury and wrongful death case arises from a collision between a truck owned by defendant-appellant Rich's Better Grease Service, Inc. ("defendant") and a car driven by Brenda Venturino. Plaintiff-appellee Raychell Coleman, Venturino's daughter, was a passenger in the car at the time of the accident. The two vehicles were travelling in opposite directions on a two-lane highway and were about to meet and pass when the collision occurred. Each driver insists the other crossed the center lane and caused the wreck. Both Venturino and Coleman suffered extensive injuries, including permanent brain injury to Raychell Coleman. In addition, Coleman's eight and one-half month viable fetus was killed.

At the time of the accident, Venturino was insured against automobile-related liability by State Farm Insurance Company. State Farm investigated the accident and subsequently paid to Coleman and Coleman's husband, Brian, the amount of Venturino's policy limit in settlement of any potential claims against Brenda Venturino. State Farm additionally made payments to Venturino for the property damage to her automobile.

During State Farm's investigation of the accident and prior to making its settlement payment to the Colemans, State Farm hired Gregg Manning, an accident reconstruction expert. Jack Brewster, the State Farm claims investigator, stated in an affidavit that State Farm hired Manning in anticipation of an expected negligence suit but had not intended to call him as a witness at trial. At the time of the investigation, however, no suit had been filed against Venturino, although Raychell Coleman had retained an attorney. As of the date of the hearing in this cause, no action has been filed against Venturino.

In August, 1986, the Venturinos and Colemans brought suit in the district court against defendant based on alleged negligence of the defendant's truck driver. In September, 1986 plaintiffs filed an amended complaint. In addition, State Farm indicated that it would seek recovery from defendant on a subrogated property damage claim for the damage to Venturino's car.

Prior to the trial, defendant noticed the deposition of State Farm's expert Gregg Manning. Defendant's counsel contended, and still contends, that Manning's expert opinion supports defendant's theory that the car driven by Brenda Venturino swerved into the path of defendant's truck. Plaintiff's counsel moved to quash the taking of the deposition. Citing Fed. R. Civ. P. 26(b)(4)(B)[1] and making the applicable findings, the district court entered an order prohibiting the defendant from deposing Manning.

Defendant then asserted that Manning would be called as one of defendant's witnesses at trial. This, too, the district court barred stating, in a later memorandum opinion, that defendant's "[c]ounsel could produce no competent authority in support of its action and this court ruled that defendant could not call Manning to testify."

At the end of the trial, bifurcated as to the action's liability and damages components, the jury returned a verdict in favor of Raychell Coleman, Brian Coleman, and Brian Coleman as administrator of the estate of the unborn child for a total of $2,290,722.92. Defendant thereafter moved the district court to set aside the jury verdict and enter judgment in defendant's favor. The district court denied this motion,

[1]See text of the rule, *infra*, in the text of this opinion.

which it considered a motion for judgment n.o.v. It is from this action of the district court that defendant now appeals. We consider whether the district court erred in refusing to permit defendant to depose Gregg Manning or to call him as a witness.[2]

The district court determined that Fed. R. Civ. P. 26(b)(4)(B) barred defendant from deposing Gregg Manning. Rule 26(b)(4)(B) provides that:

> [a] party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, *only as provided in Rule 35(b) or upon a showing of exceptional circumstances* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. (Emphasis added.)

The reference to Rule 35(b) is clearly inapplicable in this case as that Rule deals with discovery of the reports of examining physicians and was appropriately ignored by the district court in its analysis. With respect to the applicability of the remaining provisions of the rule, the district court made certain findings and conclusions that defendant now challenges.

First, Rule 26(b)(4)(B) applies only to experts retained or employed by "another party." Defendant insists that State Farm was not such a party. The district court, prior to trial, ruled that State Farm was a party to the instant action by virtue of its subrogation claim for property damage to Brenda Venturino's car. Subsquently, in response to a motion by

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[2]Defendant asserted four other grounds of error by the district court, all of which we conclude, on the basis of the trial court's rulings, are without merit.

the defendant, the district court added State Farm as a nominal plaintiff and declared State Farm a real party in interest pursuant to Fed. R. Civ. P. 17(a).

Defendant contends that the district court pulled an "end play" (the Court takes this phrase to mean an "end run") to get around the requirement that the expert must have been retained by "another party." Defendant appears to premise its contention on the fact that the district court entered its order making State Farm a nominal party and declaring it a real party in interest *after* making the ruling that Rule 26(b)(4)(B) barred defendant's deposing of Manning. In light of the fact that the court's addition of State Farm as a party was initiated by the defendant, defendant's argument of an end run is clearly disingenuous. Furthermore, we are not willing, nor is there any basis, to speculate, that the district court was attempting to construct a *post hoc* justification for its earlier ruling on defendant's attempt to depose Manning, and we emphatically reject any such suggestion.

In any event, the timing of State Farm's addition as a nominal party is not dispositive to the applicability of Rule 26(b)(4)(B). The district court found at the time of its ruling barring the deposition of Manning that State Farm was a real party in interest since it possessed the subrogation claim. In our view, the "party" element of Rule 26(b)(4)(B) was satisfied at this point. State Farm's real party in interest status was merely recognized, not created, by the district court's subsequent order.

Defendant next contends that the district court erred in ruling that State Farm hired Manning in anticipation of litigation and that State Farm did not intend to call Manning as a witness at trial. These rulings were findings of fact which we will not disturb

absent a showing that they are clearly erroneous. The District court had before it credible evidence to support these two findings, including an uncontradicted affidavit of State Farm's investigator Brewster. *Cf. Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 991 & 994-95 (D. C. Cir. 1980). We, therefore, defer to the district court's generally superior fact finding capacity.

Further, defendant has made no real effort to show that Manning's deposition should have been allowed because of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P. 26(b)(4)(B). According to one treatise:

> [i]t has been said that "since a litigant will not know what facts the opposing party's experts have discovered and what opinions they have formed, it will rarely be possible to make the required showing [of exceptional circumstances].

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2032 at 256 (1970) (quoting *U.S. v. Meyer*, 398 F.2d 66, 76 (9th Cir. 1968)). Defendant's counsel is convinced, however, that he already knew what Manning's opinion was and actually sought to depose him to confirm his existing belief that the expert's opinion would be damaging to the plaintiff's case. Nevertheless, the record contains no evidence that defendant had ascertained that Manning is the only expert who held an opinion favorable to defendant's position. Indeed, the rule only speaks of the impracticability of obtaining "opinions on the same subject." Given the widespread availability of accident reconstruction experts, we have no doubt that defendant could easily have obtained another, albeit not necessarily as favorable, expert opinion on the subject.

Nothing in the rule indicates that the choiceness of the other available opinions should be a factor in the court's analysis.

In summary, the district court correctly ruled that State Farm was a party. In addition, the district court made adequately supported findings that Manning was hired in anticipation of litigation and that State Farm never intended to call Manning as a witness. Finally, as we have previously stated, defendant has not carried its burden in showing that the exceptional circumstances exception in Rule 26(b)(4)(B) is applicable. Accordingly, we conclude that the district court was correct in ruling that rule 26(b)(4)(B) barred defendant's deposition of Manning.

Defendant next challenges the district court's refusal to allow defendant to call Gregg Manning as a witness at trial. In its memorandum opinion denying defendant's motion for a judgment n.o.v., the district court explained that:

> . . . defendant announced that it intended to call Manning as a witness at trial despite its inability to depose him. Counsel could produce no competent authority in support of its action and this court rules that defendant could not call Manning to testify.

Although the district court did not state with specificity its basis for prohibiting defendant from calling Manning, it appears that the district court believed the prohibition to be a natural extension of Rule 26(b)(4)(B) which "is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation," *see Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984).

The issue of whether Rule 26(b)(4)(B) can be read to contain a proscription on trial testimony has not received extensive consideration in the case law. Al-

though we do not construe Rule 26(b)(4)(B), under the facts of this case, to contain a broad proscription against calling witnesses who could not have been deposed under the rule, *see Granger v. Wisner*, 134 Ariz. 377, 656 P.2d 1238, 1242-43 (1982) (construing Arizona's counterpart civil procedure rule 26(b)(4)(B) which is identical both textually and foundationally to Fed. R. Civ. P. 26(b)(4)(B)); *but see Healy v. Counts*, 100 F.R.D. 493, 496-97 (D. Colo. 1984), we are persuaded that the district judge in this case did not abuse his discretion in ruling that the defendant could not call Manning to testify. *See Campbell Industries v. M/U Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) ("A district court is vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.")

Accordingly, the judgment of the district court is

AFFIRMED.

United States Court of Appeals
For The Fourth Circuit

No. 88-2095

Brenda K. Venturino; James L. Venturino; Raychell Stepp Coleman; Philip Brian Coleman, Individually and as Administratrix of the Estate of Phillip Daniel Coleman, deceased; State Farm Insurance Company

Plaintiffs - Appellees

v.

Rich's Better Grease Service, Inc., a corporation

Defendant - Appellant

No. 88-2095

Brenda K. Venturino; James L. Venturino; Raychell Stepp Coleman; Philip Brian Coleman, Individually and as Adminstratrix of the Estate of Phillip Daniel Coleman, deceased; State Farm Insurance Company

Plaintiffs - Appellees

v.

Rich's Better Grease Service, Inc., a corporation

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this

Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins with the concurrence of Judge Howard and Judge Merhige.

For the Court,
John M. Greacen
Clerk

Supreme Court, U.S.
FILED
AUG 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICH'S BETTER GREASE SERVICE, INC., a corporation,
Petitioner.

v.

BRENDA K. VENTURINO, JAMES L. VENTURINO, RAYCHELL ESTEP COLEMAN and PHILLIP BRIAN COLEMAN, Individually and as Administrator of the Estate of Phillip Daniel Coleman, deceased, and STATE FARM INSURANCE COMPANY,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court abused its discretion by prohibiting defense counsel from calling as his own witness, respondents' non-witness expert retained in anticipation of litigation.

PARTIES TO THE ACTION

Counsel for the respondents agrees with the listing of all parties contained at page 1a of the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-161

RICH'S BETTER GREASE SERVICE, INC., a corporation,
Petitioner.

v.

BRENDA K. VENTURINO, JAMES L. VENTURINO, RAYCHELL ESTEP COLEMAN and PHILLIP BRIAN COLEMAN, Individually and as Administrator of the Estate of Phillip Daniel Coleman, deceased, and STATE FARM INSURANCE COMPANY, *Respondents,*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at page 20a of the Appendix attached to the Petition For Writ of Certiorari. The opinion of the United States District Court for the Southern District of West Virginia appears at page 1a of the Appendix attached to the Petition for Writ of Certiorari.

JURISDICTION

Counsel for the respondents agrees with the statement of jurisdiction contained in the Petition for Writ of Certiorari.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Counsel for the respondents agrees with the statement of the Federal Rule of Civil Procedure Involved contained in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Counsel for the respondents generally agrees with the Petition's statement of the case below. However, the statement of the case by the petitioner fails to mention: 1) that Jack Brewster, the State Farm claims investigator, stated in an uncontroverted affidavit that the accident reconstruction expert, Greg Manning, was hired by State Farm in anticipation of litigation; 2) that the District Court made a finding that Mr. Manning was hired in anticipation of litigation by State Farm, which was a party plaintiff to the extent of its subrogation claim;[1] and 3) that there is no evidence in the record contrary to the District Court's finding.

The petitioner's statement of the case also fails to mention that Mr. Manning was never identified by counsel for the petitioner as a potential witness during the course of discovery before trial. The petitioner identified no expert witnesses in its answers to expert witness interrogatories. The petitioner did not serve any interrogatories upon counsel for the respondents requesting the identifica-

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[1] As a matter of West Virginia law, State Farm was a real party in interest to the extent of its subrogration claim and it was not necessary for them to be a named party in order for the subrogation claim to be asserted. *See, Capitol Fuels, Inc. v. Clark Equipment Company*, 342 S.E.2d 245 (WV 1986). State Farm was named a party before trial on the petitioner's motion.

tion of expert witnesses the respondents intended to use at trial.

Counsel for the petitioner had not identified any experts at the time the discovery cut-off occurred before trial. The only discovery undertaken by counsel for the petitioner before the discovery cut-off was the discovery depositions of Mrs. Venturino and Mrs. Coleman and their spouses. Counsel for the petitioner did not hire its own expert during the 1½ years this case was pending for trial. Even when the pretrial order was submitted to the Court for entry, no expert witnesses had been identified by counsel for the petitioner. It was not until three weeks before trial that defense counsel filed a notice to take the deposition of Mr. Manning.

Finally, there is no basis in the record for counsel for the petitioner's contention that Mr. Manning's opinion would support (or refute) the defendant's position below regarding the cause of the automobile accident. Mr. Manning, who was outside the jurisdiction of the District Court, was never properly served with a subpoena for appearance at trial, and counsel for the petitioner did not attempt to vouch the record with respect to Mr. Manning's testimony nor State Farm's decision to hire Mr. Manning.

SUMMARY OF ARGUMENT

The District Court properly prohibited the deposition of Mr. Manning pursuant to Rule 26(b)(4)(B). The uncontroverted evidence below was that Mr. Manning was an expert hired in anticipation of litigation by State Farm, a party plaintiff to the extent of its subrogation claim, and that the plaintiffs did not intend to use Mr. Manning as a witness at trial. The District Court made a specific finding that this was the case. There was no showing made of any exceptional circumstances why defense counsel could not obtain similar facts or opinions by other means, and accordingly, the deposition of

Mr. Manning was properly prohibited under Rule 26(b)(4)(B).

The District Court's ruling prohibiting defense counsel from calling Mr. Manning as a witness at trial was well within the Court's discretion, given the posture of the petitioner's untimely attempts to use Mr. Manning. Neither the District Court nor the Fourth Circuit has interpreted Rule 26(b)(4)(B) to contain a broad proscription against calling witnesses who could not have been deposed under the Rule. Given the petitioner's failure to divulge its intention to use Mr. Manning as a witness during the discovery period and the failure of the petitioner to divulge Mr. Manning as a witness in the pretrial order, there can be no question that the District Court properly denied the petitioner's last minute attempts to use the respondents' non-witness expert as a witness at trial.

The petitioner has not made the showing of special and important reasons for granting a writ of certiorari required by Rule 17. The decision of the Fourth Circuit is not in conflict with the decision of any other Federal Court of Appeals on the question presented, nor has there been any showing that the Fourth Circuit has departed from the accepted and usual course of judicial proceedings so as to call for an exercise by the United States Supreme Court of its power of supervision. Further, no important question of federal law arises from the record that needs to be settled by this Court

ARGUMENT

I. THE DISTRICT COURT PROPERLY PROHIBITED THE DEPOSITION OF THE RESPONDENTS' NON-WITNESS EXPERT HIRED IN ANTICIPATION OF LITIGATION UNDER RULE 26(b)(4)(B).

The *uncontroverted* evidence below showed that the accident reconstruction expert, Greg Manning, was hired in anticipation of litigation by State Farm Insurance, which was a party in the litigation to the extent of its subrogation claim. The District Court made specific findings in this regard in ruling on the respondents' motion to quash Mr. Manning's deposition. There was no evidence to the contrary presented by counsel for the petitioner. Accordingly, it was clearly appropriate for the District Court to apply Rule 26(b)(4)(B) to prohibit the deposition of Mr. Manning, absent the showing of exceptional circumstances required by the Rule. The petitioner made no attempt whatsoever below to show that exceptional circumstances existed that would justify the taking of Mr. Manning's deposition. This was noted by the Court of Appeals in its opinion. (*See*, Petition at p. 23a) Accordingly, there can be no question that the District Court properly prohibited Mr. Manning's deposition. As the Court of Appeals stated:

> [T]he district court correctly ruled that State Farm was a party. In addition, the district court made adequately supported findings that Manning was hired in anticipation of litigation and that State Farm never intended to call Manning as a witness. Finally, as we have previously stated, defendant has not carried its burden in showing that the exceptional circumstances exception in Rule 26(b)(4)(B) is applicable. Accordingly, we conclude that the district court was correct in ruling that rule 26(b)(4)(B) barred defendant's deposition of Manning.

(*See* Petition at p. 26a.)

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PROHIBITING DEFENSE COUNSEL'S LAST MINUTE ATTEMPTS TO CALL AS HIS OWN WITNESS RESPONDENTS' NON-WITNESS EXPERT RETAINED IN ANTICIPATION OF LITIGATION.

A short review of the course of discovery prior to trial helps to place the District Court's decision to refuse defense counsel's last minute attempts to depose or use plaintiffs' non-witness expert in proper prospective. The accident in this case happened on February 20, 1985. Suit was filed in the District Court on July 7, 1986. Plaintiffs served interrogatories on the defendant on August 12, 1986, requesting that the defendant identify its experts. The interrogatories went unanswered and in September 1986, plaintiffs filed a motion to compel defendant to answer the interrogatories. By order of October 30, 1986, the Court ordered the defendant to answer the interrogatories.

Despite the Court's order, the defendant still did not answer the plaintiffs' interrogatories and a motion was made for sanctions on November 7, 1986. Pursuant to a hearing on this motion, an agreement was reached between counsel that the defendant would answer the interrogatories. This was done on November 19, 1986. In the defendant's interrogatory answers, it was indicated that no determination had been made by defendant to retain any expert witnesses.

By January 1987, defense counsel had not supplemented his answers to the expert witness interrogatories. Counsel for plaintiffs sent a letter to defense counsel at that time reminding him that he had not identified any experts and asked defense counsel to supplement his answers to interrogatories with respect to expert witnesses. There was no reply by defense counsel.

On July 6, 1987, the discovery period was closed pursuant to the Time Frame Order previously entered by

the District Court. At the time the discovery cut-off occurred, defense counsel had not identified any expert witnesses. Further, defense counsel had not sent any interrogatories to counsel for plaintiffs inquiring of experts the plaintiffs intended to call at trial.

A pretrial order, which, pursuant to the District Court's Time Frame Order requires the identification of all trial witnesses, was submitted to the Court for entry on August 19, 1987. The defendant failed to identify any experts in the pretrial order whch it intended to call as witnesses at trial. However, defense counsel, for the first time, did indicate in the pretrial order that he would call as a witness at trial an "accident reconstruction expert to be named at a later date". Less than three weeks before the trial scheduled for October 6, 1987, defense counsel filed a notice to take the deposition of Mr. Greg Manning. The plaintiffs' objected to the deposition as untimely and further filed a motion for a protective order on grounds that Mr. Manning was an expert hired by a party in anticipation of litigation, who was not going to be called as a witness at trial, and therefore, was protected by Rule 26(b)(4)(B). A hearing was held on this motion on September 18, 1987. The District Court recognized that State Farm Insurance Company was a party plaintiff to the extent of its subrogation claim under West Virginia law, and the Court made a finding that Mr. Manning was an expert hired in anticipation of litigation by State Farm, based upon the uncontroverted affidavit of Jack Brewster, the State Farm claims representative.[2]

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[2] The Courts in *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1980), and *Seiffer v. Topsy's International, Inc.*, 69 F.R.D. 69 (D. Kan. 1975), both relied on uncontroverted affidavits to establish that a non-witness expert was hired in anticipation of litigation. The question of whether an expert was hired in anticipation of litigation is a question of fact for the District Court in the first instance. *Healy v. Counts*, 100 F.R.D. 493 (D. Colo. 1984).

The District Court accordingly ruled that Mr. Manning was an expert protected under Rule 26(b)(4)(B) and the defendant had failed to make any showing of exceptional circumstances why it could not obtain its own accident reconstruction expert or obtain similar facts and opinions by other means. Following this ruling, counsel for the defendant for the first time announced his intention to call Mr. Manning as a witness at trial.

As can be seen by this review of the discovery below, the petitioner failed to hire an accident reconstruction specialist of its own during the 1½ years this case was pending for trial and failed to inquire in any manner with regard to the experts the respondents intended to use at trial. It was only at the last minute, on the eve of trial, that defense counsel attempted to take the deposition of the non-witness expert previously hired in anticipation of litigation by State Farm, which was a party plaintiff and was represented at trial by respondents' counsel. In these circumstances, one can understand the trial court's characterization of defense counsel attempts to use Mr. Manning as "dirty pool". (*See* transcript of hearing 9/18/87 at p. 9) Defense counsel had every right to hire an accident reconstruction expert of his own to testify at trial and simply failed to do so.

Neither the District Court nor the Fourth Circuit Court of Appeals has interpreted Rule 26(b)(4)(B) as a broad prohibition against the calling of witnesses who could not be deposed under the Rule. The District Court's decision to refuse defense counsel's attempt to call Mr. Manning as a witness at trial is justified based solely on the fact that Mr. Manning was never disclosed as a witness by defense counsel throughout the course of discovery, and indeed, was not listed as a witness in the pretrial order. Federal district court's have broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial and within this discretion lies the power to exclude or admit expert testimony and to exclude testimony of witnesses

whose use at trial is in bad faith or would unfairly prejudice an opposing party. *See, e.g., Marine Petroleum Company v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1980); *Campbell Industries v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980).

III. THE PETITIONER HAS NOT MADE THE SHOWING OF SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI REQUIRED BY RULE 17.

The petitioner has not demonstrated any special and important reasons why this Court should exercise its discretion to review the decision below on Writ of Certiorari. The decision of the Fourth Circuit Court of Appeals is not in conflict with the decision of any other Federal Court of Appeals or in conflict with the decision of a State Court of last resort. Neither has the petitioner demonstrated that the decision of the Fourth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

Neither has the petitioner demonstrated that the Fourth Circuit Court of Appeals has decided an important question of Federal law which has not been settled by this Court, or is in conflict with the decision of this Court. The Fourth Circuit's decision has not construed Rule 26(b)(4)(B) as a broad proscription against calling witnesses who could not have been deposed under the Rule. The Court of Appeals merely decided the District Court did not abuse its discretion under all the facts of this case in ruling that the defendant could not call Mr. Manning to testify at trial. There is no important federal question raised by the Fourth Circuit's opinion; neither does that opinion conflict with any decision of any other Circuit Court or State Court of last resort, and accordingly, review on Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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